

## **Statement of the National Community Pharmacists Association (NCPA)**

### **U.S. House of Representatives Committee on Ways and Means Subcommittee on Health**

**Hearing on Health Care Industry Consolidation  
September 9, 2011**

***NCPA recommends that Congress:***

- (1) Oppose the Express Scripts and Medco Pharmacy Benefit Manager merger.***
- (2) Pass H.R. 1946, The Preserving Our Hometown Independent Pharmacies Act of 2011.***
- (3) Pass H.R. 1971, The Pharmacy Competition and Consumer Choice Act of 2011.***

**Chairman Herger, Ranking Member Stark, and Members of the Committee:**

The National Community Pharmacists Association (“NCPA”) welcomes and appreciates this opportunity to provide input and suggestions regarding the impact that consolidation within the health care industry is having on the cost of private health insurance, Medicare spending and beneficiary costs. NCPA represents the pharmacist owners, managers and employees of more than 23,000 independent community pharmacies across the United States. The nation’s independent pharmacies, independent pharmacy franchises and independent chains dispense nearly half of the nation’s retail prescription medicines.

Our members are keenly aware of recent efforts toward consolidation within the health care marketplace and are concerned regarding the probable negative impacts for patients and providers should these efforts succeed. Specifically, NCPA is concerned with consolidation within the pharmacy benefit management (PBM) industry. The recently announced proposed merger of Medco and Express Scripts, two major PBMs, will lead to decreased competition in the drug market, increased drug prices to government payers and beneficiaries, decreased patient access to high quality care, and decreased choices for patients. For those reasons, NCPA opposes the merger, encourages the Federal Trade Commission to block the merger and asks Congress to express its concerns and opposition to the merger as well.

In light of the movement towards consolidation within the health care industry, and consolidation of the PBM industry in particular, NCPA urges Congress to pass legislation to provide protection to small business community pharmacies against the negative impacts, which flow from an increasingly concentrated, anti-competitive PBM marketplace. More specifically, NCPA urges Congress to pass H.R. 1946, the Preserving Our Hometown Independent Pharmacies Act of 2011, sponsored by Congressman Marino, as well as H.R. 1971, the Pharmacy Competition and Consumer Choice Act of 2011, sponsored by Congresswoman McMorris Rodgers.

## **Recent History of Anticompetitive Practices within the Pharmacy Benefits Management Industry Related to the Merger of CVS and Caremark**

In recent years, the PBM industry has been rife with consolidation. The general result of such consolidation has been higher drug costs, decreased patient access to pharmaceutical care and lower quality of care. For example, in March 2007, CVS, the nation's largest retail pharmacy, merged with Caremark, the nation's largest PBM. The resulting prescription giant operates more than 6,800 pharmacies, holding the number one or two positions in each of the country's top ten markets with respect to retail pharmacy market share. Caremark, which serves as the PBM for the combined company, has a market share as high as 47%, and covers 134 million lives (more than twice as many as any other PBM). The combined company dominates the pharmaceutical services industry, filling or managing more than 1.2 billion prescriptions annually, servicing an estimated half of Americans.

Simply put, the evidence demonstrates that the CVS Caremark merger has had a negative impact on patients. First, CVS Caremark created the ironically named "Maintenance Choice" program that forces consumers to fill prescriptions at CVS stores/mail-order or else pay an increased co-pay to fill 90-day or maintenance prescriptions at non-CVS locations. Second, the merged entity switched Medicare beneficiaries under Caremark's plan to CVS stores with higher co-pays, thus, bringing these consumers to the Part D "donut hole" prematurely. Third, CVS Caremark used confidential patient information collected by Caremark to enable CVS pharmacists to solicit non-CVS customers by phone and mail in order to direct them to fill their prescriptions at CVS stores. Fourth, Caremark-operated Medicare Part D plans reimburse CVS pharmacies at costs that are grossly inflated relative to both the cost of the drug and the reimbursement level received by other pharmacies. Fifth, CVS Caremark requires patients with high cost specialty drugs to fill them only at CVS locations, where patients are given excessive supplies, creating expensive waste. Ultimately, the CVS Caremark merger has decreased patient choice, increased costs and generated waste. The Federal Trade Commission has an ongoing investigation into these anticompetitive and unfair trade practices.

## **The Proposed Express Scripts-Medco Merger Would Reduce Competition, Decrease Access to Quality Patient Care and Lead to Higher Prescription Drug Costs**

Examples of abuses that resulted from the CVS Caremark merger are only the beginning of the potential anticompetitive effects resulting from PBM industry consolidation. NCPA is most concerned about the future, and more specifically, the likely negative impact from the recent proposed merger of Express Scripts, Inc. and Medco Health Solutions. The merger of these two PBMs would create a "mega PBM", specialty pharmacy provider and mail-order pharmacy with market power in all of these markets that are critical to controlling health care costs. The resulting merger will harm patients by reducing choice, decreasing access to pharmacy services and ultimately leading to higher prescription drug costs paid by plan sponsors and consumers. As community pharmacists whose primary concern is patient-well-being, NCPA fervently opposes the proposed merger and asks Congress to do the same.

If the Express Scripts-Medco merger were to succeed, the merger would create a PBM with substantial market power. In fact, the proposed merger is a tipping point in terms of PBM market concentration. The merger will cause a substantial reduction in both price and non-price competition among PBMs, especially in certain defined customer segments. If approved, the “mega PBM” would control over 40% of the national prescription drug volume.<sup>1</sup>

The overwhelming size of this consolidation is enhanced by the fact that large national employers, unions, large health plans without an in-house (captive) PBM, insurance companies and federal and state government-sponsored health plans, are already largely limited in their PBM choices. Moreover, smaller regional, captive, and niche PBMs are simply not viable alternatives when it comes to the size and scope necessary to manage and administer the complex prescription drug benefits for these large national customers.

Post-merger, these large national customer segments will have few drug benefit administration alternatives, which will allow the merged PBM entity to dictate plan design and benefit structures at the expense of purchasers. The merged entity will be able to use their dominance to shift patients to favor their in-house mail operations. This shift in “mix” will force more customers to mail order and deprive consumers of access to their local pharmacies, which provide vital healthcare services. The merged entity may also restrict pharmacy networks by limiting access points. This will reduce patient choice at the outset, and will ultimately impact the economic viability of community pharmacies, leading to a diminution of services in the form of reduced hours, less consult time, and longer wait times.

Beyond the impact of the merger on the overall pharmacy marketplace, the merger would also create a dominant PBM with substantial market power in two specific submarkets: specialty pharmacy and mail-order services. The merger will combine two of the three largest suppliers of specialty pharmacy services, creating an entity with more than a 50% share of all specialty pharmaceutical sales.<sup>2</sup> This entity will have both the incentive and ability to reduce competition and prevent new competition in specialty pharmacy, an increasingly lucrative market.

The merger also likely will force more customers into mail-order. The merger will create the largest mail-order pharmacy accounting for close to 60% of all mail-order prescriptions processed in the U.S.<sup>3</sup> The merged firm will have an increased incentive to force consumers to utilize their mail order business. One misconception perpetuated by the merging parties is that this switch to mail order will lower drug costs for consumers. Evidence demonstrates that mail order pharmacies consistently dispense more costly brand-name drugs and fewer generics than retail pharmacies. Therefore, the shift to more mail order will lower the rate of generic dispensing, ultimately raising drug costs.

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<sup>1</sup> Atlantic Information Services (“AIS”), 2010 data; J.P. Morgan, Healthcare Technology & Distribution, Gill’s Guide to Rx Channel – An Investor Handbook, May 10, 2011.

<sup>2</sup> Based on 2009 reported market shares of CuraScript and Accredo to AIS and estimates from Pembroke Consulting.

<sup>3</sup> AIS 2011 data.

The combined Express Scripts-Medco will have an increased incentive to reduce transparency, and thus raise costs to consumers. Transparency into PBM practices has been an important concern of consumers, employers and pharmacies. Vigorous competition among PBMs improves transparency because plan sponsors who encounter or suspect a lack of transparency with their current PBM can switch or credibly threaten to switch to a competing PBM. Absent effective competition there is no guarantee that any hypothetical savings claimed by Express Scripts and Medco would be passed along to consumers or plan sponsors. The far more likely scenario is *increased profits for the merged entity* as a result of rebates, discounts and other spreads that they retain rather than pass through to plan sponsors. This is evidenced by the fact that in recent years the profits of the major PBMs have skyrocketed by 400 percent. That level of profitability for what are essentially middlemen is astounding.

### **H.R. 1946, The Preserving Our Hometown Independent Pharmacies Act of 2011 will Lead to Increased Quality of Care and Decreased Drug Costs**

Independent community pharmacies do not operate on a level playing field with regard to PBMs and in the face of the looming Express Scripts-Medco merger, this playing field will be even more skewed against independent community pharmacy. Not only will the PBM industry be more consolidated and anti-competitive, but the industry remains neither regulated nor transparent. They make large profits by steering patients to the more expensive brand name drugs on which they make the most money on manufacturer rebates, and often hide these profits from plan sponsors, increasing drug costs for patients and plans. Small pharmacies face a “David vs. Goliath” situation with PBMs. Because small pharmacies cannot band together and negotiate with PBMs, patients’ quality of care suffers and drug costs are higher than they should be. Allowing independent community pharmacies to negotiate on a level playing field with PBMs will improve patient access and help shift ill gotten gains from PBMs rightfully into the hands of patients.

In light of this “David vs. Goliath” scenario, NCPA urges Congress to pass H.R. 1946. The proposed legislation would allow independent pharmacies (defined as pharmacies representing less than 10% market share of a Part D prescription drug plan region) to band together to negotiate third-party contracts with PBMs. By creating this narrow exemption to antitrust law, H.R. 1946 starts to level the playing field. However, it does so without creating the overwhelming consolidation and anti-competitive concerns likely to result from the Express Scripts-Medco merger. In addition to applying the exemption only to pharmacies with less than 10% of the market share of a Part D prescription drug plan region, the bill also limits independent community pharmacies to forming negotiating entities representing no larger than 25% of all retail pharmacies in a Medicare Part D prescription drug plan region. H.R. 1946 levels the playing field for independent community pharmacies to more effectively negotiate with PBMs for high quality care and low drug costs without raising the specter of harmful anti-competitiveness, such as is raised by the proposed Express Scripts-Medco merger.

## **H.R. 1971, The Pharmacy Competition and Consumer Choice Act of 2011 will Provide Basic Protections for Consumers, Community Pharmacies and Health Plans to Make Sure Pharmaceutical Dollars are Wisely Spent**

H.R. 1971 is another vehicle through which pharmacy can fight back against the PBM-constructed artificial barriers to competition in the delivery of pharmacy services. As outlined above, these anti-competitive barriers increase costs and reduce choice. H.R. 1971 will start to break down some of these artificial barriers by providing a basic level of protection to consumers regarding their choice in where they obtain their prescription medications, saving money by making the inner workings of PBMs more transparent to plan sponsors so they know whether they are getting a good deal, and by curbing burdensome PBM audit practices of independent pharmacies and strengthening fraud protections.

More specifically, H.R. 1971 protects patients from being denied access to community pharmacies, being financially punished for having their prescription filled at a community pharmacy, and from being artificially induced to fill their prescriptions at a pharmacy owned by their health plan's PBM. The bill would also allow any licensed pharmacy willing to accept a health plan's terms and reimbursement rates to participate in that plan, so long as the pharmacy is eligible to participate in federal and state health plans.

In terms of new consumer protections, the bill would prohibit PBMs from selling sensitive patient information without the health plan being notified in advance. Moreover, patients would be shielded from PBM solicitations unless the patient and plan provide written consent.

With regard to reducing wasteful PBM spending and lowering drug costs, the bill would make sure that PBMs work on behalf of plan sponsors and patients rather than padding their own profits. The bill would require PBMs to confidentially disclose certain information to private insurance plans about, for example, whether the PBM is passing along – or pocketing – manufacturer rebates. Plan sponsors would be able to eliminate PBM practices that increase costs, such as switching patients to costlier drugs and inflated billings.

Finally, H.R. 1971 contains numerous provisions that would curb burdensome and abusive audit practices by PBMs. First, the bill would prohibit unfair penalizing of pharmacies for typographical/recordkeeping errors, thereby keeping the focus of any audits on the actual pursuit of fraud. Second, the bill would prohibit the practice of extrapolation. Third, it would prohibit forcing patients to use a specific pharmacy (retail, mail, specialty) if the PBM has an ownership interest in the pharmacy (or vice versa). Fourth, it would prohibit PBMs from requiring more stringent recordkeeping than state or federal law/regulation. Fifth, it would allow for a written appeals process and require disclosure of audit recoupment to the sponsor. Sixth, the bill would create a defined audit look back period from the date that the claim is submitted. Seventh, H.R. 1971 would allow pharmacies access to a plan's methodology for determining reimbursement rates (e.g., Maximum Allowable Costs) and require those rates to be updated frequently. Again, in the face of increasing PBM consolidation it is important that H.R. 1971 be enacted to give pharmacy the tools needed to ensure low cost, high quality patient access to needed pharmaceuticals.

## **Conclusion**

In light of the Committee's focus on the impact that health care consolidation has on the cost of insurance, Medicare spending and beneficiary costs, NCPA strongly urges Congress to investigate the anti-competitive dangers of PBM consolidation and oppose the proposed merger of Express Scripts and Medco. Furthermore, NCPA also encourages Congress to enact H.R. 1946 and H.R. 1971 in order to level the playing field for independent community pharmacies vis-à-vis PBMs, so that independent community pharmacies can continue to provide high quality, low cost health care to their patients, as these pharmacies are the backbone of their communities in both rural and urban settings. Thank you for your consideration.